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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CATHERINE DUERR,

Petitioner

-vs-

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to the Court
of Appeals for the First Appellate District
Hamilton County, Ohio

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

H. FRED HOEFLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
(513) 241-1268

Attorney for Petitioner

OPPOSING COUNSEL:

Arthur Ney
Hamilton County Prosecutor
420 Courthouse
1000 Main Street
Cincinnati, Ohio 45202

## QUESTIONS PRESENTED

I. WHETHER ONE CHARGED WITH AGGRAVATED [FIRST DEGREE] MURDER AS A CO-CONSPIRATOR WITH TWO OTHERS IS DENIED A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY BEING FORCED TO TRIAL WITH A JURY PRECONDITIONED TO FIND GUILT BY VIRTUE OF THE FACT THAT ALL TWELVE JURORS WERE AWARE AT THE COMMENCEMENT OF THE TRIAL THAT THE TWO CO-CONSPIRATOR -CO-DEFENDANTS HAD BEEN ALREADY CONVICTED OF THE CONSPIRACY MURDER FOR WHICH THE JURY WAS ABOUT TO TRY THE ACCUSED.

II. WHETHER A CONFESSION TO A MURDER CONSPIRACY IS CONSTITUTIONALLY ADMISSIBLE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHERE IT IS THE RESULT OF THE COALESCENCE OF MANY FACTORS WHICH RENDERED IT INVOLUNTARY: THE PROLONGED DETENTION OF PETITIONER; HER ILLNESS, LACK OF SLEEP, LACK OF NOURISHMENT, HER UNFAMILIARITY WITH THE CRIMINAL JUSTICE SYSTEM AND THE LEADING, EVEN ORCHESTRATION, THROUGH A "DRY RUN" OF HER STATEMENT BY THE INTERROGATING OFFICER.

PLEASE NOTE: All parties to the within action are named in the caption. Petitioner's mother, Carol Duerr, is filing a Petition simultaneously with this Petition; the two cases share the Second Question above; the first is unique to this Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

AUTHORITIES CITED.....iii

PETITION.....1

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....4

I. THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION AS TO WHETHER THE CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY IS VIOLATED BY FORCING THE DEFENDANT TO TRIAL WITH A JURY PRECONDITIONED TO FIND GUILT BECAUSE ALL TWELVE JURORS WERE AWARE EVEN BEFORE THE TRIAL BEGAN THAT PETITIONER'S CO-CONSPIRATOR-CO-DEFENDANTS HAD BEEN CONVICTED OF THE SAME CONSPIRACY-MURDER WITH WHICH SHE WAS CHARGED.....5

II. THE CONFESSION ADMITTED AGAINST PETITIONER WAS EXTRACTED IN VIOLATION OF HER PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION, IN THAT IT WAS THE PRODUCT OF THE COALESCENCE OF PRACTICALLY EVERY FACTOR PREVIOUSLY CONDEMNED BY THIS COURT AS UNDULY CONTRIBUTING TO INVOLUNTARY CONFESSIONS.....12

CONCLUSION.....15

APPENDIX A - OPINION OF THE COURT OF APPEALS.....17

APPENDIX B - DECISION OF THE OHIO SUPREME COURT, DENYING REVIEW .....33

## AUTHORITIES CITED

### CASES


Ashcraft v. Tennessee (1944), 322 U.S. 143, .....13

Chambers v. Florida (1940), 309 U.S. 227, .....13

Culombe v. Connecticut (1961), 367 U.S. 568, .....13

Duncan v. Louisiana (1968), 391 U.S. 145, .....7

Fikes v. Alabama (1957), 352 U.S. 191, .....14

Irvin v. Dowd (1961), 366 U.S. 717, .....7

Kazer v. Ohio (1831), 5 Ohio St. 280.....8

Leyra v. Denno (1953), 347 U.S. 556, .....13

Malloy v. Hogan (1964), 378 U.S. 1, .....12

Patterson v. Colorado (1905), 205 U.S. 454, .....7

Payne v. Arkansas (1957), 356 U.S. 560, .....13

Reck v. Pate (1961), 367 U.S. 433, .....13

Remmer v. United States (1954), 347 U.S. 227, .....7

Rideau v. Louisiana (1963), 373 U.S. 23, .....7

Rogers v. Richmond (1961), 365 U.S. 534, .....12

Sheppard v. Maxwell (1966), 384 U.S. 333, .....7

Spano v. New York (1959), 360 U.S. 315, .....12

United States v. Chiantese (5 Cir. 1978), 582 F.2d 974.....7

United States v. Harrell (5 Cir. 1970), 436 F.2d 606.....8

United States v. Toner (3 Cir. 1949), 173 F.2d 140.....8


### RULES


Evid.R. 801(D)(2)(e).....1


### STATUTES


Ohio Revised Code 2903.01.....2


### CONSTITUTIONAL AUTHORITY


Fifth Amendment, U.S. Constitution.....passim
Sixth Amendment, U.S. Constitution.....passim
Fourteenth Amendment, U.S. Constitution.....passim

## PETITION

Petitioner, Catherine Duerr, respectfully petitions the Court for a writ of certiorari to review the judgment and decision of the Court of Appeals for the First Appellate District, Hamilton County, Ohio, affirming her conviction for the crime of aggravated murder.

## OPINIONS BELOW

The judgment of the Court of Appeals for the First Appellate District of Ohio, rendered November 17, 1982, is unreported and appears as Appendix A to this Petition, post, at p. 17 . The decision of the Ohio Supreme Court refusing review of this case on March 9, 1983, is appended hereto as Appendix B.

## JURISDICTION

The final order of the Supreme Court of Ohio denying review herein was rendered March 9, 1983. This Petition is timely filed and jurisdiction is founded on 28 U.S.C. 1257 (3), Petitioner having asserted below and in this Court a denial of rights secured to her by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> No person . . . shall be compelled in a criminal case to be a witness against himself, . . .

SIXTH AMENDMENT, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law.

OHIO RULES AND STATUTES:

OHIO RULES OF EVIDENCE, RULE 801 (D)(2)(e)

(D) Statements which are not hearsay. A statement is not

hearsay if. . .
(2) Admission by party-opponent. The statement is offered against a party and is . . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

OHIO REVISED CODE:

Section 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

## STATEMENT OF THE CASE

Petitioner, Catherine Duerr and her mother, Carol Duerr, were indicted and convicted, along with Dennis Goerler, of the aggravated murder of Raymond Duerr in the Court of Common Pleas of Hamilton County, Ohio. Their convictions were affirmed by the Court of Appeals for the First Appellate District. The Ohio Supreme Court declined to review the case on March 9, 1983.

* * * * * * * * *

On May 19, 1981, Raymond Duerr, an engineer for the Cincinnati Gas & Electric Co., was discovered dead on the floor of the bedroom he shared with his wife Carol in their home in Anderson Township, Hamilton County, a suburb of Cincinnati. Mr. Duerr's body was discovered by his wife at approximately 8:00 P.M., after she, her daughter Catherine, Petitioner herein, and Catherine's boyfriend, Dennis Goerler, had returned to the residence after shopping and visiting Mrs. Duerr's parents. The police and life squad responded, and Carol and Petitioner were briefly interviewed by police that night.

The following day, W. Stewart Mathews, II, a Cincinnati attorney, contacted the Sheriff's office on behalf of Carol Duerr, his client, with respect to securing the return of Mr. Duerr's checkbook and other personal items taken by police and/or life squad members when Mr. Duerr's body was removed. An appointment was made for Mrs. Duerr to report to the Hamilton County Sheriff's headquarters at 6:00 P.M. that

evening.

Mrs. Duerr, Petitioner and Goerler appeared at police headquarters as scheduled, having first dropped the Duerrs' other daughter, Mary Beth, off at her apartment in Fairfield. The two women and Goerler arrived at police headquarters at 6:00 P.M. on May 20, and at 7:00 P.M. Mrs. Duerr was interviewed until 8:45P.M. Thereafter, Goerler was taken back, followed by Petitioner. Both Goerler and Petitioner gave statements in the early morning hours which implicated themselves and Mrs. Duerr in the slaying of Mr. Duerr. Carol Duerr was again taken back for questioning, and made a taped statement at 7:20 A.M., concluding at 8:10 A.M. The statements of all three were introduced against them by the state in each of their separate trials.

During Mrs. Duerr's statement, between 7:20 and 8:10 A.M., according to the defense, Mrs. Duerr's attorney, alerted by Mary Beth Duerr that her mother and sister had been at police headquarters all night, called headquarters. Mathews maintained that he called shortly after 7:45, when Carol's statement was being taken; Captain Henke of the Sheriff's office, admitted taking the call, but indicated that the statements had been concluded at the time Mathews called.

The three were jointly indicted for the aggravated murder of Mr. Duerr. A bill of particulars filed by the state alleged that Goerler was the triggerman, and was alone in the house when Mr. Duerr was shot; the two women were alleged to have been co-conspirators with Goerler, but were charged as principals.

The three defendants were granted separate trials, but, as Petitioner and her mother were represented by the same attorneys, their trials had to be at different times. Carol Duerr and Goerler went on trial to juries in separate Common Pleas courtrooms at the same time, and Petitioner's trial began approximately two weeks after her mother's and boyfriend's trials both resulted in convictions of aggravated murder.

Prior to trial, all three defendants had a joint hearing on motions to suppress statements filed by all three. The trial court denied the motions to suppress, which were principally based upon the prolonged detention, lack of sleep, meals and medicine, and illness suffered by the respective defendants, and the Duerrs had further alleged that they were denied the right to counsel as well.

During the two separate trials of Petitioner and her mother, the prosecution introduced the statements despite the fact that there had been no testimony concerning the cause of death of the victim, over objection by the defense that the corpus delecti had not yet been established, as is required by Ohio law. Statements by the codefendants were also admitted over objection, the trial court in each instance ruling that the statement by the defendant then on trial constituted "independent" evidence of the conspiracy so as to justify the admission of such statements.

Finally, Petitioner's trial commenced over proper objection of the defense, where six of the jurors eventually seated were fully aware, even before voir dire began, that Petitioner's two alleged co-conspirators had been convicted of the conspiracy, and the murder, and the other six jurors were well aware of the result by the time the trial started, (as was even conceded by the Court of Appeals.) Nevertheless, defense motions for change of venue and challenges to the array and to the jury as seated for cause were denied.

Both Carol Duerr and her daughter, Petitioner, were convicted of aggravated murder and were sentenced to life imprisonment. Their appeals were unsuccessful, though they generated detailed opinions from the Court of Appeals, which recognized that Petitioner's appeal presented a constitutional question of first impression in any jurisdiction, and that both cases presented an additional question of first impression in Ohio. Despite the obvious significance of the

questions presented by this case, and the gravity of the charges of which Petitioner was convicted, and the severity of her sentence, the Supreme Court of Ohio did not see fit to review the case, denying Petitioner's application for review on March 9, 1983.

## REASONS FOR GRANTING THE WRIT

I. **THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION IN THAT THE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY EXCEEDS BOTH IN KIND AND DEGREE ANY SUCH VIOLATION HERETOFORE REPORTED IN THE ANNALS OF ANGLO-AMERICAN JURISPRUDENCE, PETITIONER HAVING BEEN FORCED TO TRIAL WITH A JURY WHICH WAS PRECONDITIONED TO FIND HER GUILTY BY THE KNOWLEDGE THAT BOTH OF PETITIONER'S CO-CONSPIRATOR-CO-DEFENDANTS HAD BEEN CONVICTED OF THE CONSPIRACY-MURDER IN WHICH PETITIONER WAS ACCUSED OF PARTICIPATING AS A CO-CONSPIRATOR.**

The factual basis for this claim may be stated simply. Petitioner, her mother Carol Duerr, and Dennis Goerler, were jointly indicted for the aggravated murder of Raymond Duerr. The State, through a bill of particulars, claimed that Goerler was the triggerman, and Petitioner and her mother were indicted as co-conspirators, though neither had been present at the time that Goerler shot and killed Mr. Duerr.

Goerler and Mrs. Duerr were tried simultaneously, but in different courtrooms before different juries. The verdict in each case was guilty as charged. The case proved to be one of the most sensational murder cases seen in Cincinnati in some time, and the media responded predictably. Parts of the proceedings were televised, and the story of the conviction of Goerler and Mrs. Duerr were trumpeted throughout the media, which made ample use of the word "plot" to denote the existence of a conspiracy.

Petitioner's trial began two weeks later. The defense made all appropriate challenges to the jury panel and filed a motion for change of venue, which was denied. It developed

even as the voir dire began, that fully six of the jurors eventually seated and who voted to convict Petitioner were already aware that Goerler and Mrs. Duerr had been convicted of the conspiracy-murder. [Jurors Groger (R. 121); Kerscher (R.72); Sutton (R. 71); Peacock (R. 60); Schwartz (R.64); and Schuster, the eventual foreman, who stated during voir dire that "I imagine everybody knows" the outcome of the prior trials (R.56)]. It should be noted further that the defense exhausted all peremptory challenges.

Further, it became apparent throughout the voir dire that the other prospective jurors eventually seated were made aware through the voir dire proceeding itself that Mrs. Duerr and Goerler had been convicted. [Prospective juror Vogt, who was not selected, indicated that while she did not know the outcome of the prior trials before coming to court, that "I can make a pretty good guess based on the discussions this morning." (R.69).]

Therefore, when all objections had been raised and denied, Petitioner was forced to trial with a jury, each and every member of which was aware that Petitioner's two alleged co-conspirators in the murder of her father had already been duly convicted in courts of law by other Hamilton County juries. The Court of Appeals conceded this fact, but held that since each juror stated that he could be impartial, that was the end of the matter, it being left to the assessment by the trial judge of the credibility of each juror who protested that he would be impartial.

* * * * * * * *

"England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury . . . . In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . [A juror's] verdict must be based

upon the evidence developed at trial . . . . This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies . . . ." Irvin v. Dowd, 366 U.S. 717 (1961). The Sixth Amendment to the Constitution of the United States is the ultimate authority granting the right to a fair and impartial jury, and its guarantees are binding upon the states through the Due Process Clause of the Fourteenth Amendment, Duncan v. Louisiana, 391 U.S. 145 (1968).

An essential component of a fair trial by an impartial jury is the requirement that jurors, as triers of the fact, must reach their conclusions only through "evidence and argument in open court, and not by any outside influence, whether private talk or public print," Patterson v. Colorado, 205 U.S. 454, 462. This Court has not been reluctant to reverse convictions returned by juries which have been subjected to material printed in newspapers, Sheppard v. Maxwell, 384 U.S. 333 (1966), or broadcast through the electronic media, Rideau v. Louisiana, 373 U.S. 23 (1963). The Court has gone so far as to hold a presumption of prejudice when an outside influence affects a jury in a criminal case, Remmer v. United States, 347 U.S. 227 (1954), for "the insinuation of outside influences is inimical to the premises upon which our system of justice rests," United States v.Chiantese, 582 F.2d 974, 979 (5 Cir. 1978).

In some of the cases cited, the Court has reversed because the media atmosphere was such that it was presumed that the jurors could not avoid being affected, or, at least, that there was an unacceptable risk because of the surrounding circumstances that the jurors would be influenced by impermissible factors. In others, the Court has reversed because of communications with the jurors by outside influences. In our case, however, the Constitutional violation is more severe still.

Here, the jurors began the trial with the knowledge that Petitioner's two co-conspirator-co-defendants had already been

convicted by similar juries in the same Court of precisely the same conspiracy-murder as that with which Petitioner had been indicted; the jurors were consequently informed that the other two defendants had been judicially concluded to have been guilty of conspiring with Petitioner in the successful murder of her father.

For more than one hundred fifty years, it has been the law of Ohio that evidence of the conviction of one person of a crime is not admissible in evidence against another person charged with the same offense as a co-conspirator with the first, Kazer v. Ohio 5 Ohio 280 (1831). It is the only reported Ohio case on the subject and is still good law. The federal courts have universally followed the same rule, finding that such evidence of a co-conspirator's conviction is only admissible to impeach his credibility if he later testifies against the defendant. That exception does not apply here, as neither Goerler nor Carol Duerr testified in Petitioner's case.

Of course, the vice in this situation is that one cannot conspire with himself. The Fifth Circuit summed it up in a nutshell: "If Norris [the alleged co-conspirator] was guilty of conspiring with Harrell, how then could Harrell be other than guilty of conspiring with Norris? Jurors equally with others are aware that 'it takes two to tango.'" United States v.Harrell, 436 F.2d 606, 614 (1970). The Third Circuit, in United States v. Toner, 173 F.2d 140 (3 Cir. 1949), stated that it is "the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. Acquittal of an alleged fellow conspirator is not evidence for the man tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible against one now being charged [or tried]."

Petitioner here was more prejudiced than were the defendants in either of those federal cases, however. Those

cases dealt with the inadmissibility of evidence of convictions, or admissions of guilt by co-conspirators. Here, the jury had before it not merely some evidence of the co-conspirators guilt, evidence presented in court which could at least be challenged by Petitioner at trial; here, Petitioner's jury was preconditioned from the outset to find guilt - because Petitioner's co-conspirators had already been convicted in the same court of law by other juries of the very conspiracy-murder which they were about to try.

Here, unlike the Sheppard case, the jurors were not "asked" by a hostile press for a conviction -- they were aware that other juries much like themselves had heard essentially the same evidence and had found both other alleged co-conspirators guilty of the conspiracy which culminated in the aggravated murder of Mr. Duerr.

Any sincere juror could not avoid being influenced by this knowledge - any reasonable doubt in Petitioner's favor would certainly evaporate in the face of the fact that the other juries, hearing the same evidence, had concluded that no reasonable doubt existed, and particularly so where Petitioner's jury need not conclude that she was involved in the actual killing, but only that she was a member of the conspiracy.

Further, these jurors were well aware that the attention of the community would be focused on their "performance" as it had on the juries at the trials of the other co-conspirator-codefendants two weeks previously. The jury would be asked to "perform" for media and public attention, to make a judgment as to whether or not Petitioner was guilty. The public and press would be following the case avidly, as is evidenced by the applications for in-court during-trial television coverage in the record. Much as Petitioner's jurors were to judge her, they would be judged by their friends, relatives and associates, and their verdict would be compared with those in the other cases. A similar verdict of guilty would, of course, be acceptable; after all, the other two had been convicted. A

verdict of innocence, however, would raise many uncomfortable questions. The public dismay and ridicule which would accompany a not guilty verdict in the face of the guilty verdicts in the other cases could be predicted with mathematical certainty by any reasonably intelligent juror. It is quite unfair to place a juror in such a situation; it is constitutionally intolerable to have forced Petitioner to trial with a jury subject to such pressures, and which is preconditioned to find her guilty. It was thus prejudicial error of the gravest sort to deny Petitioner's objections to the jury and her motion for change of venue.

Finally, we note what may be the most disturbing aspect of the case from the perspective of the proper scope of appellate review. The Court of Appeals in effect abandoned Petitioner's claim when it held that the great constitutional issue presented here was nothing more than a matter of leaving the question to the trial judge's assessment of the credibility of the prospective jurors' denials that they would be influenced by their admitted knowledge that Petitioner's co-conspirator-codefendants had already been convicted of the conspiracy-murder of Mr. Duerr. In every reported case, including the great jury cases cited above, each and every juror stated that he could be fair and impartial; yet this and other Courts have concluded that such protestations are not always to be given full credit. "No doubt each juror was sincere when he said that he would be fair and impartial, [but] . . . the psychological impact requiring such a declaration before one's fellows is often its father," Irvin v.Dowd, supra.

The Court of Appeals accepted fully the factual basis for our claim -- that by the beginning of the trial, all twelve jurors were aware of the convictions of the co-conspirator-co-defendants-- and rejected it, essentially, as the product of an unreviewable decision by the trial judge as to credibility. Of course, if this approach were correct, none of the great

jury cases would ever have been decided, and Sam Sheppard, and countless others, would have died in prison. In none of these significant jury cases has even one juror been seated who admitted that he would not be fair and impartial. Such a protest of impartiality is but the beginning, and not the end, of the inquiry.

It is probably safe to assume that a juror who indicated on voir dire that he could not be fair and impartial would never be seated, and has never been seated in an American courtroom, whether the case was civil or criminal, significant or insignificant. The Court of Appeals saw fit to leave the determination of whether Petitioner's jury was a fair and impartial jury to the unfettered discretion of the trial judge to believe or disbelieve the protests of the jurors that they could be fair despite the fact that all twelve were aware even before the first shred of evidence was admitted, that Petitioner's alleged co-conspirators had been already convicted of the conspiracy-murder of Mr. Duerr. Surely this knowledge was more likely to influence the jurors than the pretrial publicity in Sheppard and Rideau, for example. Yet those cases resulted in a reversal of the conviction because the risk of taint was unacceptable. Here, the prejudice is even greater, and the Court below abdicated its responsibility to the sole discretion of the trial court.

There is not one case in the annals of Anglo-American Jurisprudence upholding a conviction by a jury which was seated preconditioned with the knowledge that all of the elements of the offense with which the accused was charged have already been found by other juries in the same court to have been established beyond a reasonable doubt, including the existence of the conspiracy between the accused and the already-convicted co-conspirator-co-defendants. Unless this conviction is reviewed and reversed by this Court, this case will be the first, and the constitutional right to a fair and impartial jury in conspiracy-murder cases, at least, will have been dealt a severe, perhaps fatal blow.

II. **THE CONFESSION ADMITTED AGAINST PETITIONER WAS EXTPACTED IN VIOLATION OF HER PRIVILEGE AGAINST SELF INCRIMINATION SECURED TO HER BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT WAS THE PRODUCT OF A COALESCENCE OF PRACTICALLY EVERY FACTOR PREVIOUSLY CONDEMNED BY THIS COURT AS UNDULY CONTRIBUTING TO THE MAKING OF AN INVOLUNTARY CONFESSION.**

When Petitioner, her mother, and Goerler appeared at Sheriff's headquarters at 6:00 P.M. on the day after her father's murder, Petitioner had had almost no sleep for two days; she was interrogated twice before her confession was begun at 4:21 A.M.; she had had nothing to eat but one half of a cold, greasy hamburger; she was ill; and she was totally unfamiliar with the criminal justice system.

The test of the admissibility of a confession is whether it is voluntary, not whether it is true or false, Spano v. New York, 360 U.S. 315 (1959). The Fifth Amendment privilege against self incrimination is binding on the states through the due process clause of the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1 (1964).

The test of voluntariness, in turn, is whether the behavior of law enforcement, in conjunction with the other facts and circumstances surrounding the giving of the statement, was such as to overbear the will to resist and to bring about confessions not freely self-determined, Rogers v. Richmond, 365 U.S. 534 (1961). Through the years, this Court has condemned several factors which have given rise to involuntary confssions. Most of those factors are present in this case, and it is the coalescence of these factors which constitutes the basis for this constitutional claim.

**(1) Prolonged detention.** Petitioner was at the police station from 6:00 P.M. on May 20, 1981 continuously until 4:21 A.M. on May 21, when her taped statement commenced, approximately ten and one half hours after her arrival at headquarters. She had first been interrogated from 8:30 P.M.

until 10:30 or 11:00 P.M., and then, after Goerler made his statement, she met with him at 2:45 A.M., at which time Goerler told her he had confessed, Petitioner was again interrogated from then until 5:19 A.M. when her taped confession had been concluded. The statement of rights form was completed at 3:00 A.M., but her statement did not commence (for the tape recorder) until 4:21 A.M.

This Court has decided many cases where prolonged detention prior to the giving of a confession was condemned as a contributing factor in an involuntary confession: Spano v. New York, supra.; Culombe v. Connecticut, 367 U.S. 568 (1961) [12 hour detention]; Chambers v. Florida, 309 U.S. 227 (1940). Ironically, in Chambers, the accused was also held from the afternoon of May 20 to the early morning hours of May 21, and the result was the same as here: an involuntary "sunrise" confession.

**2. Lack of nourishment.** Petitioner had only half a greasy hamburger to eat while she was at police headquarters for ten and one half hours prior to the tape recorded statement. Lack of nourishment has also been recognized by the Court as a factor contributing to involuntary confessions, Watts v. Indiana, 338 U.S. 49 (1949), Payne v. Arkansas, 356 U.S. 560 (1957), Reck v. Pate, 367 U.S. 433 (1961).

It is interesting to note that, although the detective who participated in Petitioner's interrogation and the taking of her taped statement claimed that Petitioner did not indicate hunger, and denied that she asked for food (R. 235), on the partial basis of which Petitioner's motion to suppress was denied, the tape recorded statement itself contains a request by Petitioner for food! Certainly this fact renders suspect the credibility of all of the officers who testified that Petitioner did not demand counsel.

**3. Lack of Sleep.** Lack of sleep has often been cited by the Court as another factor in the making of involuntary confessions, Watts v. Indiana, supra., where the Court held

that disregard for the rudimentary needs of life, opportunities for sleep and a decent allowance of food, are relevant, not as aggravating elements of the suspect's treatment, "but as part of the total situation out of which his confessions came and which stamped their character," 338 U.S at 53. See also Chambers v. Florida, supra., Leyra v. Denno, 347 U.S. 556 (1953). Lack of sleep and the fatigue resulting therefrom was the basis for the Court's holding a confession involuntary in Ashcraft v. Tennessee, 322 U.S. 143 (1944). The lack of sleep is perhaps the most significant factor in the weakening of one's resistance and resolve. Its effects are both physical and mental and contributed significantly to the decision of Petitioner to make the statement which ultimately resulted in her conviction and life sentence. Petitioner had not slept for almost two days when her statement was taken by police. The resulting fatigue played a considerable part in the making of her involuntary statement.

**4. Illness of the Suspect.** Physical and mental illness also is a significant factor in the determination of the voluntariness of confessions, Reck v. Pate, supra. It is uncontradicted that Petitioner was ill on the night of her interrogation, indeed, she had been ill (and the police knew it) the very evening of Mr. Duerr's death; Lieutenant Hulgin was only able to speak with her briefly then because of her illness (R. 87). She was without sleep or food as well for the two days preceding her statement, and the illness, combined with fatigue and hunger contributed significantly to the giving of the statement.

**5. Leading question and answer statement.** While the statement here is not quite as fraught with suggestion and response as her mother's, Petitioner was admittedly taken through a dry-run of her statement before it was committed to the tape recorder. By this method, the suggested answers desired could be implanted in Petitioner's mind, yet the tape recording would not reveal the extent to which she had been

led as to the desired responses.

A leading question and answer type statement has been condemned by this Court as a hallmark of an involuntary statement, Spano v.New York, supra., Fikes v. Alabama, 352 U.S. 191 (1957). A statement obtained by suggesting responses through a dry run is also, or should be, considered in the determination of the voluntariness of a statement.

**Petitioner's unfamiliarity with the criminal justice system.** Petitioner was but 18 years of age when the instant offense was committed; she had no prior criminal record, and was certainly unfamiliar with the ways of crime and its detection. This Court, in Reck v. Pate, supra. has cited the accused's unfamiliarity with the criminal justice system as an important factor contributing to involuntary confessions. This factor is certainly present here.

All of these factors are present to some degree in this case. Petitioner's statement was the involuntary product of the coalescence of these factors. Illness, fatigue, unfamiliarity with the ways of crime and its detection, a statement rehearsed with the officers before committing it to tape, all are present here and all establish the involuntariness and unconstitutionality of Petitioner's confession. It was secured from her and used against her in violation of the privilege against self-incrimination secured to her by the Fifth Amendment and the due process clause of the Fourteenth. Because this statement was the only evidence tending to connect Petitioner with the conspiracy-murder of her father, its use was certainly prejudicial. The Court is respectfully urged to review and reverse the judgment below.

## C O N C L U S I O N

It is important that the Court review and reverse Petitioner's conviction because it is important that it be established once again that the right to a fair and impartial jury, the right underlying our entire criminal justice system,

be meaningfully enforced. This case presents an issue of first impression in Anglo-American jurisprudence, and it is a question of first impression precisely because the constitutional violation is so blatant and so fundamental that it has never been heretofore countenanced by an American Court. It is further important that this Court hold that, whatever procedural rules provide regarding claims of impartiality asserted by prospective jurors, the Courts will nonetheless examine closely such claims, and will vigorously protect the right to a fair and impartial jury by reversing any judgment rendered by a jury whose "impartiality" has been tainted to the degree apparent here. Petitioner was tried by a jury which was preconditioned to find guilt, and is serving a sentence of life imprisonment as the result. Surely the Constitution cannot tolerate such abuses as occurred here.

Petitioner was also convicted by the use of a confession tainted by the presence of practically every coercive fctor condemned by this Court short of physical torture. That confession was the only evidence connecting her to the crime for which she was convicted , and constitutes a separate violation of her constitutional rights as important, if not as blatant or unique, as the denial of her right to trial by a fair and impartial jury.

The Court is respectfully urged to grant the Petition, to review the judgment below, and to reverse Petitioner's conviction.

Respectfully submitted,

H. FRED HOEFLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
Telephone: (513) 241-1268

Attorney for Petitioner

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | NO. C-810803 |
| Plaintiff-Appellee, | : | |
| vs. | : | O P I N I O N. |
| CATHERINE DUERR, | : | |
| Defendant-Appellant. | : | |

FILED
COURT OF APPEALS
NOV 17 1982
CLERK OF COURTS

APPEAL FROM THE COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

Messrs. Simon L. Leis, Jr., William E. Breyer, Carl W. Vollman and Michael R. Barrett, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Wm. Stewart Mathews, II and James M. Rueger, 1300 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202, and Mr. H. Fred Hoefle, 1010 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, P.J.

The defendant-appellant was indicted on a charge of the aggravated murder of her adoptive father, Raymond Duerr. Indicted with her on the same charge were her mother, Carol Duerr, and Dennis Goerler. Separate trials were requested and granted. In due course, an evidentiary hearing was held on the defendant's

motion to suppress, heard by stipulation along with similar motions by the other two defendants, and the motion was overruled. Immediately following the conclusion of the separate trials of Carol Duerr and Dennis Goerler, the instant matter proceeded to trial by jury, at the conclusion of which the defendant was found guilty as charged and was sentenced as appears of record. Appeal was timely filed, with five assignments of error raised for review, considered here, for reasons which will become obvious, other than in their numbered order of presentation.

The trial in the instant appeal, the third in point of time of the triumvirate indicted for the aggravated murder of Raymond Duerr, produced substantially the same testimony and evidence on behalf of the state as did the two earlier trials of Carol Duerr and Dennis Goerler,[1] and has produced three assignments of error raising substantially the same questions explored and decided in *State v. Duerr, supra*. Because of this substantial identity, no attempt will be made herein to reproduce the analysis of fact and issue set forth fully in our disposition of that appeal, which we adopt as fully as though set forth herein. We will accordingly limit our discussion of these common assignments of error -- the third, fourth, and fifth -- to such points of dissimilarity or differentiation from those cases as may be said to arise under the record of the instant case.

In the case of both the fourth assignment of error, which raises the issue of whether the state had adduced sufficient evidence of the *corpus delicti* prior to offering the defendant's

confession, and the fifth assignment of error, which argues that the court erred in overruling the motion to suppress the confession, the issues and facts are essentially identical with those raised, considered, and ruled upon in *State v. Duerr, supra*. For the reasons set forth therein, these two assignments of error are overruled. In the case of the third assignment of error, which raises the issue of the independent proof of a conspiracy necessary to precede introduction of out-of-court statements of co-conspirators, we again adopt the rule of *State v. Duerr, supra*, that such independent proof of a conspiracy may be satisfied, as here, by the statement of the defendant herself. With certain minor and non-prejudicial exceptions,[2] all such statements of co-conspirators postdated the introduction of Catherine Duerr's confession, which furnished proof of the conspiracy and thus provided the basis for such out-of-court declarations. We find no error prejudicial to the defendant and overrule the third assignment of error.

In her two remaining assignments of error, which will be considered in inverse order, issues unique to the instant appeal are presented for review. In her second assignment of error, the matter in dispute is stated thusly:

> The trial court erred to the prejudice of defendant-appellant by allowing evidence of extrajudicial inculpating statements made by co-defendants to be brought before the jury in her trial.

The citation within this assignment of error to those portions of the record relied upon to exemplify the error,[3] as well as the defendant's statement of the issue for review under the assignment

of error, to wit:

> An accused's right of cross-examination secured by the confrontation clause of the Sixth Amendment is violated by the comparison, during trial, of extrajudicial statements made by a co-defendant inculpating the accused, with a statement given by the accused, which was previously introduced into evidence.,

seem to us to manifest a certain confusion of concepts. The defendant appears to postulate a general rule that the out-of-court confession of one conspirator may never be used against a co-conspirator because it violates the Sixth Amendment right of cross-examination, citing *Bruton v. United States* (1968), 391 U.S. 123, 88 S. Ct. 1620. Yet *Bruton* involves a case where the co-conspirators were also co-defendants, and does not speak to the instant case, where separate trials were granted the conspirators pursuant to Crim. R. 14, a rule designed to preclude just such prejudicial effect as *Bruton* speaks to. Under the facts here, it seems to us, the issue of whether an out-of-court confession of a co-conspirator will be admitted into evidence becomes one that asks whether the confession is competent evidence, not whether it is constitutional. Obviously, any out-of-court statement offered for the truth of the matter asserted will affect to some degree the right of confrontation and cross-examination. Yet, we know that there are certain of such statements which, because of their special nature or qualities, are either excluded from the hearsay rule, Evid. R. 801(D), or may be qualified as competent by special statute or rule, Evid. R. 802, or are listed exceptions to the general rule of hearsay exclusion, Evid. R. 803. Clearly, then, not every hearsay proffer raises an insur-

mountable Sixth Amendment question. *Ohio v. Roberts* (1980), 448 U.S. 56, 63, 100 S. Ct. 2531, 2537.

We believe that the real issue raised in defendant's second assignment of error is whether the trial court erred in admitting the testimony in question because of general incompetence as hearsay. In addressing this problem, several things should be preliminarily noted. First, the confession, as such, of the defendant's co-conspirators was not sought to be introduced into evidence. A review of footnote 3, where the disputed testimony is set out, demonstrates that the testimony of what the co-conspirators may have said in their confessions was at most indirect, *i.e.*, it consisted of questions designed to elicit differences between the facts asserted in the defendant's confession and those contained in Goerler's earlier confession. The relevance of this series of questions is said to be an attempt by the state to counter the argument made by defendant in her counsel's opening and closing statements, that Goerler forced or influenced her to make the confession which was not, it was thus argued, a voluntary and knowing act on her part. The fact that there were significant differences in the two statements, argues the state, is relevant to counter this suggestion that it was dictated, in effect, by Goerler.

Second, (assuming, for the moment, that the confessions, as such, were nevertheless somehow before the court) it seems apparent that the exclusion applicable to earlier statements of the co-conspirators admitted into evidence pursuant to Evid. R. 801(D)(2)(e), and made the subject of our disposition of the third assignment of error herein (and more fully in our disposition of the third assign-

ment of error in *State v. Duerr, supra*), is not available in the instance of the confessions. It seems clear that when Goerler confessed his complicity in the crime and implicated Carol Duerr and the defendant as co-conspirators, the confession could no longer be said to have been a statement made "during the course and in furtherance of the conspiracy," Evid. R. 801(D)(2)(e), not even with the qualification offered by *State v. Shelton* (1977), 51 Ohio St. 2d 68, 364 N.E.2d 1152, as to statements made after the crime but while the conspirators were still concerned with concealing their conduct or identity. When Goerler confessed, all questions of concealment of conduct and identity had passed.

These subsidiary matters behind us, we can progress to the principal question raised in this assignment of error: does the testimony in question constitute hearsay inadmissible by Evid. R. 802, and did the court commit prejudicial error in admitting it? We think not. As we earlier commented, the questioning was indirect. With one possible exception relating to whether Goerler confessed that he was to receive an automobile as his part of the bargain -- to which the answer was negative -- and which we cannot conceive was prejudicial -- all of the questions were directed to what the defendant said that may have supplemented or differed from Goerler's confession. The defendant argues that this sort of questioning necessarily put Goerler's confession before the jury: that if Witness A disagrees with Witness B when A says it was light, then one necessarily infers that B said it was dark. We conclude, however, that while this logic may be acceptable where the alterna-

tives are limited and opposed, as between light and dark, such is not the instant case. Here, every question asked and answered, with one exception mentioned above, related to matters confessed by the defendant which supplemented or added to that received from Goerler. The only inference the jury could have drawn from this was the obvious: not what Goerler said, but only what he did not say. Under these circumstances, we do not see the involvement of the hearsay rule at all. The second assignment of error is overruled.

Finally, the defendant asserts in her remaining assignment of error that the trial court erred in overruling her motion for a change of venue, and her challenge for cause of the panel of jurors selected to try the cause. The defendant's issue presented for review phrases the matter with particularity:

> Every person charged with a serious offense is entitled to trial by a fair and impartial jury as a matter of right under the United States and Ohio Constitutions, and it is reversible error to proceed to trial over objection of the defendant where half the jurors who voted to convict the accused were aware that the trials of the co-defendants alleged by the state to have conspired with the accused to commit the murder ended in conviction of the co-defendants.

The factual circumstance giving rise to the question raised in this issue may well be repeated at this point. It will be recalled that the defendant, her mother, Carol Duerr, and Dennis Goerler were indicted jointly for aggravated murder, but were granted separate trials pursuant to Crim. R. 14. Dennis Goerler and Carol Duerr were tried separately and simultaneously, but since the defendant and Carol Duerr had common counsel, a simultaneous trial of the latter two was impossible. The defendant was, therefore, tried

about two weeks after verdicts of guilty had been returned on the two earlier cases. These verdicts were, of course, the subject of reporting in both the printed and electronic media, including references to the conspiracy aspect of the cases. Court's Exhibit 1. Defendant argues that this reportage of the earlier related cases, and the knowledge thereof admitted by about half of the jurors ultimately seated, inevitably prejudiced the defendant's constitutional right to a fair and impartial jury requiring a change of venue and/or a discharge of the panel, citing *State v. Wilson* (1972), 29 Ohio St. 2d 203, 211, 280 N.E.2d 915, 921.

We have reviewed the extensive record of the *voir dire* examination and jurors' instructions, occupying over 150 pages of the transcript of the proceedings, and conclude that the court did not err in overruling the motions for a change of venue and for a challenge for cause of the panel of jurors. We note, first, that the trial court postponed its ruling on the motion for a venue change until completion of the *voir dire* process permitted an informed conclusion by the trial judge as to whether pre-trial publicity would prevent a "fair and impartial trial." Crim. R. 18(B). This procedure has been accepted and approved in numerous decisions.

> There are, of course, rare cases in which local publicity has been so pervasive and prejudicial that inquiry by *voir dire* is unnecessary and a change of venue is constitutionally required. . . . In general, however, a careful and searching *voir dire* provides the best test of whether pretrial publicity has prevented obtaining a fair and impartial jury from the locality.

*State v. Bayless* (1976), 48 Ohio St. 2d 73, 97, 357 N.E.2d 1035, 1051, *vacated on other grounds* (1978), 438 U.S. 911, 98 S. Ct. 3135. *See also State v. Swiger* (1966), 5 Ohio St. 2d 151, 214 N.E.2d 417, *cert. denied* (1966), 385 U.S. 874; *State v. Drake*, C-73215 (1st Dist. June 10, 1974). At the conclusion of the *voir dire* examinations, the motion for a change of venue was overruled, and we find no error in having done so.

While the media accounts of the crime and the proceedings thereafter were fully and prominently reported, we find none of the circus atmosphere, nor what the *Bayless* case, *supra*, termed the "pervasive" -- intrusive might be a better word -- effects of publicity which would have required a change of venue without more. *See, e.g., Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S. Ct. 1417; *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 S. Ct. 1507. We proceed then, to an analysis of the *voir dire* examinations to review the trial court's determination as to whether a fair and impartial trial may be had in the community. It is clear from the examinations that roughly half of the jurors seated, after both sides had exhausted their peremptory challenges, had heard or read some part of the accounts of the preceding trials and most or all had some knowledge of the crime in question from media accounts. It is also clear that, after skilled and searching examinations of those potential jurors so responding to counsel for the defendant, in each such instance the juror unequivocally responded that he or she would place such knowledge out of mind, and would render a verdict based only on the evidence and in accordance with law. Nothing in this

record would warrant us in holding that the trial court could not credit these protestations and affirmations by the jurors, and nothing in the record would permit us to conclude that the procedures followed in the *voir dire* were insufficient to develop fully the evidence necessary to determine properly the motion for venue change. As a result, we find no error, whether constitutional or under Crim. R. 18(B), in overruling the motion for a change of venue.

The second aspect of defendant's argument under this assignment of error is more searching. The defendant argues, in effect, that no matter what response a potential juror may make to *voir dire* questioning, no matter what his affirmation that he will abjure all prior knowledge and follow only the evidence and the law, he is irremediably and *per se* prejudiced if he concedes knowledge of the results of a prior trial of a co-conspirator of the defendant. The defendant relies on the well established rule that evidence of the earlier conviction of a co-conspirator of the defendant is inadmissible because its prejudicial effect outweighs its doubtless probative value, citing *United States v. Toner* (1949), 173 F.2d 140. The defendant reasons that such prejudice is just as intrusive when the knowledge of the earlier conviction comes from sources preceding and independent of the trial, or when it results during the course of the *voir dire* examination itself (as was the case with the other half of the jurors who were not previously aware of the results of the earlier trials). No instruction or affirmation, argues the defendant, will suffice to drive

this knowledge from a juror's mind, or leave unimpaired his ability to decide the issues fairly and impartially. The precise point appears to be one of first impression in this jurisdiction. Indeed, counsel cite us to no authorities here or elsewhere which may be said to deal directly with the issue.

We conclude, on balance, against the rigid position argued by the defendant. It is instructive to note the fourteen specific bases listed in Crim. R. 24(B) for challenges for cause, the matter at issue. None of them are directly on point, unless it may be said to be subsumed within the catchall provision of Crim. R. 24(B)(14) "(t)hat he is otherwise unsuitable for any other cause to serve as a juror." Of greater importance, we think, is the following provision of Crim. R. 24:

> "(B) Challenge for Cause. A person called as a juror may be challenged for the following causes:
>
> (9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

Under the terms of the above provision, a juror may be seated, notwithstanding a previously formed opinion of the defendant's guilt, upon the court being satisfied from the *voir dire* examination that he will nevertheless render an impartial verdict according to the law and the evidence. It therefore follows, *a fortiori*, that a juror who has formed no such opinion or impression, but who is merely aware of some of the publicized circumstances of the case

and of the fate of co-conspirators of the defendant, ought not to suffer a challenge for cause when, as here, the court is satisfied, fr an examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial. *See Dobbert v. Florida* (1977), 432 U.S. 282, 97 S. Ct. 2290, *reh'g denied* (1977), 434 U.S. 882, 98 S. Ct. 246.

But even more basic than the foregoing are our firm conclusions after a thorough review of the record that: the issues in the instant case, including those relating to the qualification and seating of jurors, were vigorously presented by competent and aggressive trial counsel for both the defendant and the state; that the trial atmosphere, including the *voir dire* process, was maintained by an experienced trial judge in a correct, low-keyed, and entirely professional posture eminently suitable for the pursuit of truth, devoid of hysteria or *ad hominem* irrelevancies; and that the defendant received therein a fair trial from an impartial jury.

The first assignment of error is overruled, and the judgment is affirmed.

DOAN and KLUSMEIER, JJ., CONCUR.

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1. *State v. Goerler*, No. C-810778 (1st Dist. Nov. 17, 1982), and *State v. Duerr*, No. C-810761 (1st Dist. Nov. 17, 1982).

2. The only instances we have been able to discover from the record where pre-confession statements of co-conspirators may be said arguably to have occurred are at T.p. 186, where the witness Pensak testifies to an introduction of Catherine Duerr's boyfriend, performed by Carol Duerr after the homicide had been discovered, at T.p. 187, where Pensak relates a statement made by Carol Duerr, to the effect she was going to let her dogs in, to neighbors searching the house after the discovery of the body, and at T.p. 189, where Pensak states that Carol Duerr answered "no" to an inquiry about her husband's ownership of guns. Another witness, one Carl Boltz, was permitted to testify to the introduction by Catherine Duerr of Dennis Goerler to Boltz, T.p. 196, and that Carol Duerr had requested Boltz to fix her an alcoholic drink at one point during the evening of the 19th. T.p. 203. The instances are trivial and fail, beyond reasonable doubt, to involve prejudice.

3. Q. Let me ask you this, Officer. What did Cathy tell you in her statement that you had not already heard at that time? Anything?

MR. MATHEWS: Objection.

THE COURT: Overruled.

A. There were several different things that we learned from Cathy that we didn't learn from Dennis. Cathy told us about how they tried placing some shells in the gun they had, that they were the wrong size.

Q. Did she tell you what caliber ammunition they tried and didn't work?

A. I believe she stated it was .25 caliber.

Q. And, Officer, in the course of your investigation, were you later able to verify the fact Dennis Goerler purchased .25 caliber ammunition?

A. Yes, sir, Swallens.

Q. What else did she tell you that Dennis didn't tell you?

MR. MATHEWS: Again, going to object.

THE COURT: Overruled.

A. She explained after the killing, she explained Dennis came out of the house with a pair of rubber gloves which Dennis didn't tell us.

Q. Officer, were you later able to verify, in fact, Cathy's mother, Carol, had gone to Kunkel's Pharmacy and purchased the rubber gloves?

A. Yes, sir.

Q. And what else did she tell you that Dennis didn't tell you?

MR. MATHEWS: To which I object, again.

THE COURT: Same ruling. You may answer.

A. She also explained when her father reached the top of the steps how he was to be shot in the head and fall back down the stairs. Dennis didn't mention that.

Q. Anything else in detail she told you Dennis didn't tell you.

MR. MATHEWS: To which I object, Your Honor.

THE COURT: Same ruling. You may have a continuing objection in this area.

MR. MATHEWS: Thank you, Your Honor.

A. She explained in a little more detail how they drove down to the river to dispose of the weapon, the gloves and the towel.

Q. Did she give you the exact route they took?

A. I believe she did, yes.

Q. What else did she tell you that Dennis didn't tell you?

MR. RUEGER: Excuse me, Your Honor. I think there's a question pending, isn't there?

THE COURT: Right, let the witness answer.

A. Offhand, I can't remember anything right now.

Q. Officer, do you recall whether or not Dennis Goerler mentioned the fact that he was to receive an automobile for his particular part in this incident?

MR. MATHEWS: Objection.

THE COURT: He may answer.

A. He didn't mention it, Cathy did.

Q. Cathy mentioned the automobile?

A. Yes, sir.

Q. Who mentioned insurance?

A. We brought the insurance up, discussed it with Cathy. She stated how she was going to get a car and also Dennis.

Q. Dennis did not mention that in his statement, though?

A. No, sir.

T.p. 324-327.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

# THE SUPREME COURT OF THE STATE OF OHIO

*THE STATE OF OHIO,*
*City of Columbus.*

State of Ohio,
Appellee,
*vs.*
Carol Duerr and Catherine Duerr,
Appellants.

*19 83 TERM*
*To wit:* March 9, 1983

*No.* 83-57

**MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS**

*for* HAMILTON *County*

*It is ordered by the Court that this motion is overruled.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

*COSTS:*

*Motion Fee, $20.00, paid by* H. Fred Hoefle

*I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.*

*Witness my hand and the seal of the Court*

*this ..... day of ..... 19 .....*

*..... Clerk*

*..... Deputy*

# THE SUPREME COURT OF OHIO

*THE STATE OF OHIO,*
*City of Columbus.*

*19* 83 *TERM*

*To wit:* March 9, 1983

State of Ohio,

Appellee,

*vs.*

Carol Duerr and Catherine Duerr,

Appellants.

*No.* 83-57

**APPEAL FROM THE COURT OF APPEALS**

*for* HAMILTON *County*

*This cause, here on appeal as of right from the Court of Appeals for* HAMILTON *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein*

FOR YOUR INFORMATION ONLY NOT FOR FILING

*It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for* HAMILTON *County for entry*

*I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.*

*Witness my hand and the seal of the Court this ..... day of ..... 19 .....*

..... *Clerk*

..... *Deputy*

NO. 82 6699

RECEIVED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CATHERINE DUERR,

Petitioner

-vs-

THE STATE OF OHIO,

Respondent

On writ of Certiorari
to the Court of Appeals
First Appellate District
Hamilton County, Ohio

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

Catherine Duerr, Petitioner, through counsel, respectfully represents to the Court that she is indigent and without funds to pay the costs of prosecuting this action, and respectfully moves the Court for an order granting leave to proceed herein in forma pauperis.

H. FRED HOEFLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
Telephone: (513) 241-1268

Attorney for Petitioner

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

| | |
|---|---|
| CATHERINE DUERR,<br>Petitioner<br>-vs-<br>THE STATE OF OHIO,<br>Respondent | AFFIDAVIT OF INDIGENCE |

STATE OF OHIO, UNION COUNTY, SS.

CATHERINE DUERR, being first duly sworn, deposes and says that she is currently an inmate in the Ohio Reformatory for Women, Marysville, Ohio, serving a sentence of life imprisonment pursuant to her conviction for aggravated murder; that she is unemployed and indigent, and has no funds to pay for the costs or expenses of the prosecution of this appeal, nor does she have any property which could be used to pay or secure the payment of such costs or expenses; for the same reason, she is unable to afford the services of counsel to represent her in this appeal. And further affiant sayeth naught.

Catherine Duerr
Catherine Duerr

Sworn to before me and subscribed in my presence this 5 day of May, 1983.

Mary E. Burns
Notary Public

MARY E. BURNS - UNION COUNTY
State of Ohio
My Commission [illegible]

Office - Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-6699

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CATHERINE DUERR :

Petitioner :

vs. :

THE STATE OF OHIO :

Respondent :

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REPLY BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Arthur M. Ney, Jr.
Prosecuting Attorney

Leonard Kirschner
Assistant Prosecuting Attorney

William E. Breyer
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202
513/632-8778

Attorneys for Respondent

OPPOSING COUNSEL:

H. Fred Hoefle
Attorney at Law
1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202

## QUESTIONS PRESENTED

I. DOES THE MERE FACT THAT SOME POTENTIAL JURORS ARE AWARE OF THE NATURE OF THE CASE AND THAT SOME POTENTIAL JURORS ARE AWARE OF THE VERDICTS IN A CO-DEFENDANT'S CASE, DISQUALIFY THOSE JURORS FROM SERVING, WHERE THE VOIR DIRE PROCESS REVEALS THAT ALL SEATED JURORS CAN SERVE IN A FAIR AND IMPARTIAL MANNER?

II. WHETHER A CONFESSION IS ADMISSIBLE IN EVIDENCE WHERE THE FOLLOWING FACTORS ARE PRESENT; THE DEFENDANT HAS BEEN ADVISED OF HER MIRANDA RIGHTS THREE TIMES AND HAS SIGNED A WRITTEN WAIVER THEREOF, THE DEFENDANT NEVER REQUESTS COUNSEL, THE DEFENDANT IS COURTEOUSLY TREATED AT ALL TIMES, THE DEFENDANT IS ACCOMPANIED BY ACQUAINTANCES, IS FED AND GIVEN FREEDOM OF MOVEMENT, AND THE DEFENDANT WAS VOLUNTARILY PRESENT AT THE POLICE STATION TO COOPERATE WITH POLICE, WHO ORIGINALLY DID NOT CONSIDER HER A SUSPECT?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | 1 |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| OPINIONS AND JUDGMENTS IN LOWER COURTS | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2,3,4, 5,6,7 |
| ARGUMENT ON REASONS FOR DENYING WRIT | 8 |
| I<br>THE FACT THAT POTENTIAL JURORS ARE AWARE OF THE NATURE OF THE CASE, AND THAT SOME ARE AWARE OF VERDICTS IN A CO-DEFENDANT'S CASE, DOES NOT DISQUALIFY THEM FROM JURY SERVICE. THE TEST FOR A CHANGE OF VENUE REMAINS THE ABILITY TO SEAT A FAIR AND IMPARTIAL JURY. | 8,9 |
| II<br>WHERE THE RECORD DEMONSTRATES SCRUPULOUS POLICE ADHERENCE TO THE MIRANDA RIGHTS, AND FURTHER SHOWS THAT THE DEFENDANT WAS COURTEOUSLY TREATED AT ALL TIMES, THAT QUESTIONING WAS IN A NON-COERCIVE ATMOSPHERE, AND THAT WHILE AT THE POLICE STATION THE DEFENDANT WAS ACCOMPANIED BY HER MOTHER AND BOYFRIEND, THAT SHE WAS FED AND RETAINED FREEDOM OF MOVEMENT, THE ENSUING CONFESSION IS PROPERLY ADMITTED AT TRIAL. | 10,11, 12,13, 14,15 |
| CONCLUSION | 15 |

TABLE OF AUTHORITIES


| | Page |
|---|---|
| **CASES:** | |
| Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978) | 10 |
| Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977) | 8,9,15 |
| Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966) | 10 |
| Murphy v. Florida, 432 U.S. 794, 95 S. Ct. 2031 (1975) | 8,15 |
| Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977) | 12 |
| Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507 (1966) | 9 |
| State v. Antill, 176 O.S. 61, 197 N.E. 2d 548 (1964) | 10 |
| State v. Barker, 53 O.S. 2d 135, 372 N.E. 2d 1324 (1978) | 12 |
| State v. Bayless, 48 O.S. 2d 73, 357 N.E. 2d 1035 (1976) | 9 |
| State v. Fairbanks, 32 O.S. 2d 34, 389 N.E. 2d 352 (1972) | 9 |
| State v. Osborne, 50 O.S. 2d 211, 364 N.E. 2d 216 (1977) | 9 |
| State v. Petro, 148 O.S. 463, 76 N.E. 2d 355 (1947) | 10 |
| State v. Wilson, 30 O.S. 2d 199, 283 N.E. 2d 632 (1972) | |
| Watts v. Indiana, 338 U.S. 49, 69 S. Ct. 1347 (1949) | 13 |
| **CONSTITUTIONAL AUTHORITY:** | |
| 28 United States Constitution, Section 1257(3) | 1 |
| **RULES:** | |
| Criminal Rule 24, Trial Jurors | 8 |

## OPINIONS AND JUDGMENTS IN LOWER COURTS

The decision of the Ohio First District Court of Appeals is accurately set forth in the brief of petitioner. The decision of the Ohio Supreme Court refusing review of this case, released March 9, 1983, is accurately set forth in petitioner's brief.

## JURISDICTION

Petitioner's claim of jurisdiction is founded on 28 U.S.C. 1257 (3), and petitioner's claims involve an allegation of denial of constitutional rights.

## CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> No person. . . shall be compelled in a criminal case to be a witness against himself, . . .

SIXTH AMENDMENT, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

a.) Procedural Posture

Petitioner Catherine Duerr was indicted on May 27, 1981, by the Hamilton County, Ohio Grand Jury. Duerr and two co-defendants were each charged with one count of aggravated murder. Petitioner was tried to a jury, with trial commencing on September 14, 1981, and was found guilty as charged. On November 17, 1982, the Ohio First District Court of Appeals affirmed appellant's conviction. On March 9, 1983, the Ohio Supreme Court released its decision refusing to review the case.

b.) Facts

On the evening of May 19, 1981, the Hamilton County Sheriff's Patrol received a phone call regarding a possible homicide at 7929 Asbury Hill Drive in the Anderson Township area of Hamilton County. Officers who responded to the scene found the body of Raymond Duerr on the second floor of the home. Mr. Duerr had been shot twice and was deceased. The patrol officers first on the scene at once called their superiors and several detectives responded to the scene. The time was approximately 8:30 p.m.

Initial investigation led the detectives to believe that a burglar had killed Mr. Duerr since the assailant had apparently kicked in a garage door to gain entrance, and had then been surprised by Mr. Duerr when he arrived home from work. Police continued to do a crime scene work-up at the Duerr residence during the evening, with Detective Hulgin, the officer in charge, having arrived on the scene at about 9:45 p.m.

Carol Duerr, the wife of the deceased and Cathy Duerr, step-daughter of the deceased, along with Cathy's boyfriend Dennis Goerler, had discovered the body and reported the crime. When the first officers arrived on the scene they had instructed these three to leave the scene and stay at a neighbors home until later. At about 11:00 p.m. Detective Hulgin went to the neighbors residence to speak to these three. Hulgin spoke to Carol Duerr for about an hour, in an effort to establish a time frame for the crime and to see if she could provide any information. (R 86) Hulgin spoke to Cathy Duerr for only about 10 minutes at this time, since she was laying down and was supposedly not feeling well. Other people, including Dennis Goerler, were in the room while Hulgin spoke to Cathy Duerr. Hulgin then spoke to Dennis Goerler for about 45 minutes, before leaving at about 1:00 a.m. (R 88) and returning to the Duerr residence, where he remained

until about 7:00 a.m. on the 20th, before going to the Sheriff's Patrol station on Hamilton Avenue. At this time the police has absolutely no suspects or leads.

During the early investigation and through the afternoon of May 20th, the police theory of the case gradually began to change. The police began to discard their original theory that a professional burglar had committed the crime. There were two reasons for this change. First it was felt a professional burglar would not be at work at the time the crime was committed, since late afternoon and early evening hours are most likely to find people at home. Secondly, it was felt that a professional burglar would only shoot once and then flee rather than pursuing the victim and shooting twice as was done here. For these reasons the police began to theorize that the crime was committed by a burglar who lived in the area, perhaps an amateur or a teen-ager, someone whom Mr. Duerr could have identified, and who for that reason felt compelled to kill him to prevent arrest. (R 90, 162) Detective Captain Henke of the Sheriff's Patrol explained the police theory of the case as of early on May 20th, 1981.

> "One, was the fact that the victim was shot twice. He was shot in one location, pursued to another location, and shot again. That is not, the normal burglar in our opinion would, if he would have to shoot somebody, would only shoot once and normally they would run to try to get away from somebody, out of the house, shoot once and run. It was our opinion at that point, the direction we were looking was possibly a neighborhood burglar, someone Mr. Duerr knew, and that's the reason he was shot twice, pursued. In other words, shot once in one location, pursued to another location and shot again. It was at that point we were pursuing a local burglar that was known to Mr. Duerr." (R 162)

* * * * *

> 'Well, one was the time frame. The professional burglar usually doesn't work in that time frame so that we felt, in other words, supper hour, professional burglars usually try to avoid that hour because lots of people coming and going home from work. That's one of the things that led us to believe possibly a juvenile or somebody in the neighborhood." (R 163)

At this time no one had ever considered Dennis Goerler, Carol Duerr or petitioner Cathy Duerr as suspects in this case. (R 49, 136, 138, 163)

After discussions on May 20th the police decided to reinterview Dennis Goerler and Carol and Cathy Duerr to see if they could develop some

leads as to this theory. A police officer called Carol Duerr and asked if she would drop by Patrol Headquarters for an interview and if Dennis Goerler and Cathy Duerr would come also. Carol Duerr was also interested in picking up some of her husband's property and she agreed to stop by with the others at about 6:00 p.m. (This other property was later found to have been turned over to the coroner and was not at the Hamilton Avenue Sheriff's station.) Detective Hulgin explained the reason for the interview as:

> "Detective Diersing requested Mrs. Duerr, Catherine Duerr, and Dennis Goerler respond to our Headquarters so that we may further interview those persons who may be able to provide us with certain information that could give us possible leads in the investigation." (R 48) See also R 143 and 145.

Dennis Goerler, Carol Duerr, and Catherine Duerr arrived at the Hamilton Avenue Sheriff's Patrol at 6:00 p.m. on the 20th in response to the police request to drop by for interviews.

When these three arrived the front door to the facility was locked, and they entered through the rear and were escorted to a waiting room. At this time Carol Duerr was told that the property she was seeking was not at the station. The waiting area where they were seated was described as follows:

> "A. You walk into a foyer, a large hall. Situated in this hallway several pieces of leather furniture, a couch, chairs, the stand with some magazines, and the ladies restroom is off of the hallway and off that hallway, back the other end of the building, were the headquarters, deputies, where persons are remanded.
>
> Q. This lounge area is like a separate room from the detective rooms or the clerk's room or the record room or what have you, Isn't that correct?
>
> A. Yes, sir, like a waiting room.
>
> Q. Like a waiting room and a person can come and go in that room as they please; isn't that correct?
>
> A. That's correct.
>
> Q. There are no detective stations out there, are there?
>
> A. No." (R 142)

The two Duerrs' and Goerler sat in this lounge alone from 6:00 p.m. until 6:45 p.m. At no time were they restrained of their liberty or denied freedom of movement, and during this initial period there were not even any police officers in the area.

At 6:45 p.m. Detective Hulgin asked Carol Duerr to talk to him in an interview room. Carol Duerr was not a suspect at this time and no Miranda warnings were given. This interview lasted from 7:00 p.m. until 8:30 p.m. Carol Duerr made no incriminating remarks at this time and she did not incriminate either Dennis Goerler or Cathy Duerr. At this time Carol returned to the lounge and shortly thereafter Cathy Duerr and Dennis Goerler were asked to enter different interview rooms. Detective Hulgin interviewed Cathy Duerr, and while this was going on defendant Goerler sat in another room and carried on a general conversation with some other officers. Defendant Goerler described that time period as follows:

> "A. All the time I was in the back room with them they talked about being married and divorced, Vietnam, different war zones, percentage of how many ex-G.I.'s or ex-Vietnamese veterans and policemen wind up getting divorced, and cars, just general talking.
>
> Q. Now you've characterized that as general conversation; is that correct?
>
> A. Yes, sir." (R 6)

At this time neither the Duerrs nor Goerler were suspects and they were not under arrest. During her interview Cathy Duerr said nothing which incriminated either Carol Duerr or Dennis Goerler.

At 10:45 p.m. Detective Hulgin began to interview Dennis Goerler. (R 64) At this time Goerler was not under arrest and would have been free to leave if he had wanted to. Likewise Carol and Catherine Duerr were not under arrest, and both were free to leave if they so desired. During the evening both Duerrs had freedom of movement and Carol Duerr made numerous phone calls to her mother, in which she indicated her own belief that she would be free to leave. Carol Duerr was also provided with food during the course of the evening. Petitioner Catherine Duerr spent much of her time sleeping. (R 190) At one point Cathy Duerr actually left the station alone and then returned. Petitioner Catherine Duerr was also provided with food during the course of the evening. Goerler was not a suspect at this time and the purpose of the interview was informational, an attempt to develop some leads in the Duerr homicide. (R 59) Goerler was not advised of his rights at the time the interview began. Shortly after entering the interview room Goerler told Hulgin that his stomach was bothering him and that his medicine was gone. (Goerler had brought some medicine with him but

had consumed it.) At this time Carol Duerr then left the police station alone and drove to a drug store, bought some medicine and brought it back to Goerler. The interview then continued after this. At about 12:20 a.m., during the interview, Goerler made a remark which Hulgin at once felt to be of a somewhat incriminating nature. (R 64, 65) At this time Hulgin orally advised Goerler of his Miranda rights. (R 64)

Hulgin then explained to Goerler why he was now suspicious of him and told him what possible charges he faced. Goerler then indicated that he would give a statement. (R 67) Hulgin also told Goerler that before Goerler said anything further he would like another officer to be present, (R 69), and Detective Diersing came into the room. At 12:50 a.m. Goerler executed a formal Miranda acknowledgement, and waiver form, in the presence of the two officers. Recording equipment was then set up and a recorded statement was then taken from Goerler. The first item that appears on the recorded statement is a readvisement and waiver of the Miranda rights. (See exhibit #1 at motion) In the body of this statement Goerler acknowleges his involvement in the Duerr homicide. He also incriminated both Carol and petitioner Cathy Duerr in a conspiracy to kill Raymond Duerr.

After Goerler gave his statement police officers then reinterviewed petitioner Cathy Duerr. She was advised of what Dennis Goerler had stated, and she was advised of her Miranda rights and signed a waiver form. At 4:21 a.m. petitioner Cathy Duerr then gave police a lengthy statement concerning her involvement in the Raymond Duerr homicide. During the course of this statement she incriminated both Dennis Goerler and Carol Duerr. This statement concluded at about 5:20 a.m. At no time did Cathy Duerr ever request an attorney.

The first portion of the taped statement is a readvisement of the Miranda warnings. Then the following appears:

> "Earlier Cathy you signed a waiver here that you understand those rights. You do understand all of your legal rights?
>
> D. Yes sir.
>
> L. And this signature waiving those rights for this interview is your signature?
>
> D. Yes sir.
>
> L. Were any promises or threats made to you in regard to your rights?
>
> D. No.

L. Okay, and you do wish to give us this statement, is that correct?

D. Yes."

When this statement concluded petitioner Catherine Duerr was arrested and charged with Aggravated Murder. Also charged were Dennis Goerler and Carol Duerr.

Petitioner Catherine Duerr was the last of the three co-defendants to be brought to trial. By the time her trial commenced both the co-defendants had been tried and convicted. Prior to trial defense counsel requested a change of venue. The trial court deferred ruling on this motion until after the voir dire of the jury. An initial pool of 30 jurors was brought in for voir dire. From this original pool the parties were able to successfully seat a jury and two alternates.

Six eventual jurors indicated that they were aware of the verdicts returned in the cases of the two co-defendants. Almost all jurors were aware of the general nature of the case. However, every juror selected specifically stated that this knowledge would not affect them in any way, and that they would judge the case solely on the evidence presented during trial. At one point defense counsel challenged the entire panel for cause, (R. 74-5) contending that their knowledge of the other cases should disqualify them. This was denied. At the time the jury selection was completed the motion for change of venue was denied.

REASONS FOR DENYING WRIT

I. THE FACT THAT POTENTIAL JURORS ARE AWARE OF THE NATURE OF THE CASE, AND THAT SOME ARE AWARE OF VERDICTS IN A CO-DEFENDANT'S CASE, DOES NOT DISQUALIFY THEM FROM JURY SERVICE. THE TEST FOR A CHANGE OF VENUE REMAINS THE ABILITY TO SEAT A FAIR AND IMPARTIAL JURY.

Petitioner Catherine Duerr contends that the trial court erred in denying her motion for change of venue and her challenge for cause of the entire jury panel. This issue presents a strictly legal question, since the facts are not in dispute. Essentially all the jurors were aware, in advance, of the nature of the case, and six of them knew of the verdicts in the trials of the co-defendants. However, all the eventual jurors without any equivocation, indicated they had no preconceived opinions; that they could be fair and impartial, and that they would try the case solely on the evidence presented at trial. Thus, the issue here is whether a juror's media gained knowledge of a case is per se grounds for disqualification. Appellee submits that the answer to this question is no.

Criminal Rule 24, Trial Jurors, sets forth the applicable Ohio procedure in regard to seating a jury. Section (B) of that rule provides in pertinent part, that:

> "(B) Challenge for cause. A person called as a juror may be challenged for the following causes:
>
> . . . . .
>
> (9) That he is possessed of a state of mind evincing enmity or bias toward the defendant of the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial."

This rule thus provides that advance knowledge is not a grounds for disqualification as long as the court is satisfied that the juror can remain impartial. This is in accord with Ohio case law. State v. Wilson, 30 O.S. 2d 199, 283 N.E. 2d 632 (1972).

The bare fact of extensive pre-trial publicity and the jurors knowledge thereof does not call for a disqualification or a change of venue. The United States Supreme Court has often considered this issue. Thus in Murphy v. Florida, 432 U.S. 794, 95 S. Ct. 2031 (1975) and Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977) the court held that extensive pub-

licity, standing alone, even though as a result thereof the community is well aware of the charges, is not enough to require a change of venue. Dobbert involved particularly heinous crimes, much more severe than those in the present case. In Dobbert the Court stated:

> "(a) Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitution unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in the community of either the crime or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a 'trial atmosphere. . . utterly corrupted by press coverage'."

Applying these guidelines to the present case it is apparent that the trial court correctly declined to change venue.

In this case the trial court deferred ruling on the change of venue motion until after the voir dire process was completed.

This is the accepted method in Ohio for determining the necessity of a change of venue. State v. Bayless, 48 O.S. 2d 73, 357 N.E. 2d 1035 (1976); State v. Osborne, 50 O.S. 2d 211, 364 N.E. 2d 216 (1977); State v. Fairbanks, 32 O.S. 2d 34, 389 N.E. 2d 352 (1972). At the conclusion of the voir dire it was obvious that a fair and impartial jury had been selected. Not one juror equivocated in any fashion over his or her ability to be impartial. This is all that the law requires.

In support of her motion defendant submitted a collection of clippings which was represented as being the total print media coverage of this case. These clippings are contained in the record on appeal. An examination of these clippings reveal that they contain straightforward news accounts. They report only facts. They do not contain calls for conviction of this defendant. There is none of the "yellow journalism" found repugnant in Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507 (1966). Respondent submits that this type of press coverage will not justify a change of venue, and knowledge thereof is not a basis for disqualification of a juror.

II. WHERE THE RECORD DEMONSTRATES SCRUPULOUS POLICE ADHERENCE TO THE MIRANDA RIGHTS, AND FURTHER SHOWS THAT THE DEFENDANT WAS COURTEOUSLY TREATED AT ALL TIMES, THAT QUESTIONING WAS IN A NON-COERCIVE ATMOSPHERE, AND THAT WHILE AT THE POLICE STATION THE DEFENDANT WAS ACCOMPANIED BY HER MOTHER AND BOYFRIEND, THAT SHE WAS FED AND RETAINED FREEDOM OF MOVEMENT, THE ENSUING CONFESSION IS PROPERLY ADMITTED AT TRIAL.

Petitioner contends that the lower Court erred in overruling her motion to suppress her statements to police. Petitioner's arguments in this regard are based upon an assumption of facts which are not supported by the record. In many instances the facts here were in dispute at the motion to suppress (which was conducted jointly) with the three defendants claiming one thing and police officers testifying to the contrary. In resolving disputes such as this certain rules have gained wide spread acceptance at the appellate level. Thus it is generally held that the trier of fact is the sole judge of the credibility of witnesses and weight of the evidence. State v. Petro, 148 O.S. 463, 76 N.E. 2d 355 (1947); State v. Antill, 176 O.S. 61, 197 N.E. 2d 548 (1964). In this case the trial judge was the trier of fact at the motion to suppress. He chose to disbelieve the defendants and to believe the police testimony. This finding can not be challenged on appeal. Further, on appeal the evidence must be viewed in the light most favorable to the party which prevailed at trial. Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978). In this case the state prevailed at the motion to suppress and is thus entitled to draw all necessary favorable inferences from the evidence presented there.

The facts present here show that the joint motion to suppress was properly overruled. Initially it should be noted that the strictures of Miranda were complied with, not once, but three separate times. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Petitioner was advised of her rights orally, read and signed a written waiver form, and was advised on tape for all to hear. At no time did she ever request an attorney. In the latter two cases this is not even a dispute between police and defendant with no independant evidence. The Court can look at the written waiver, and listen to the tape, and observe that petitioner never requested counsel when she had the perfect opportunity to do so. The police here scrupulously adhered to the guidelines of Miranda. Petitioner argues that Miranda is only the starting point in a suppression case. This is not true here.

Where police demonstrate, convincingly, that proper procedures have been followed, the defendant must show some extraordinary factor to justify suppression.

Before dealing with the petitioner's specific complaints here it is important to set the background. A murder had just occurred. The police had no leads and no suspects. In homicides it is important to act at once; most homicides, if not solved quickly, are not solved at all. Because of this the police officers involved here were working round the clock, with little or no sleep. In order to develop leads they asked Carol Duerr, petitioner Cathy Duerr and Dennis Goerler to come in for interviews. These three were not at the police station as murder suspects. They were there playing the role of "bereaved" wife and daughter, cooperating with police in an effort to solve the murder of Raymond Duerr. That is why they came to the police station that evening, and that is why they cooperated by remaining there.

Regarding the events of the evening when the confession was obtained, the facts may be chronologically listed as follows:

1) Catherine Duerr, her mother and boyfriend arrive at the police station at 6:00 p.m. and are seated in lounge area until 7:00 p.m. No police present with them at this time.

2) Carol Duerr interviewed at about 7:00 p.m. She is not a suspect. During interview she does not incriminate anyone. Interview ends at 8:45.

3) Petitioner Catherine Duerr is interviewed. She is not a suspect and does not incriminate anyone. At conclusion of interview she returns to lounge and is with her mother.

4) Dennis Goerler interviewed. During course of evening petitioner Cathy Duerr spends time sleeping in lounge and talking to mother. She is provided with food. At one point she leaves alone and returns.

5) Dennis Goerler, during his interview gives confession, incriminating both Cathy and Carol Duerr. Goerler's statement is concluded after 2:00 a.m.

6) Cathy Duerr reinterviewed, commencing about 2:15 a.m., advised orally of her rights, later read waiver which she signed at 3:00 a.m. Again advised on tape prior to giving confession. Tape recorded confession commenced at 4:21 a.m. and concluded at 5:19 a.m.

During this entire time frame, from arrival until her interview at 2:15 a.m., Cathy Duerr was never arrested or led to believe she was under arrest. She was free to leave the police facility at all times, and in fact did leave at one time. (R. 185 motion to suppress) She was in a lounge area with her mother, she was provided with food and drink. She never requested an attorney, despite numerous opportunities to do so. The facts show a voluntary, truthful confession, and defendant apparently concedes the truthfulness, arguing only that it was involuntary.

(1) Petitioner argues that she was subjected to prolonged detention. This is not true. Petitioner was not in detention until after she gave her statement. She voluntarily came to the station to be interviewed, and at least until her co-defendants incriminated her, she was always free to leave. In fact, petitioner Catherine Duerr left alone and returned at one point. This could hardly be called detention. Petitioner was never in a cell, always in a lounge area, and her companions were with her or close by. Officer Datello sat with the Duerrs to keep them company, not to arrest them, and he never restrained them in anyway. The fact that the interview took place at a police station does not mean that detention occurred. Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977). In Mathiason, the Court stated:

> "In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way'."

Just because Carol Duerr was at a police station does not mean she was in detention. In State v. Barker, 53 O.S. 2d 135, 372 N.E. 2d 1324 (1978) the Ohio law of arrest was stated as follows:

> "1. The existence of an arrest is dependent not upon the fact that a suspect who voluntarily comes in for questioning concerning possible involvement in a murder is immediately given the Miranda warnings, nor upon the period of the questioning, but upon the existence of four requisite elements: (1) An intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested."

In the present case there was never any intent to arrest petitioner. There was no reason to even suspect her until after midnight, she was never physically arrested until after her statement, nor did she understand herself to be restrained. In sum, there was no prolonged detention here.

2) Petitione cites to Watts v. Indiana, 338 U.S. 49, 69 S. Ct. 1347 (1949) and similar cases to argue that the denial of food is a ground for suppression. Unfortunately for the petitioner this factor is not present here. Petitioner was provided with food. (R. 203) During the evening, around midnight, both petitioner and her mother were given a hamburger. During the course of the evening Carol Duerr consumed "drinks, crackers, soft drinks, coffee." Catherine Duerr did not ask for any more food. (R. 203) Quite simply there was no deprivation of food. In fact, she could have fed herself when she left the station alone.

3) Petitioner argues that she was without sleep for several hours. (R. 301) This of course, if true, was not the fault of the police. When the Duerrs arrived at the station they were treated comfortably and courteously. Each was seated in a lounge area and could have sleep if she wanted to. In fact, petitioner Catherine Duerr did sleep in the lounge area. The tape recorded statements here do not reveal defendants befudled by lack of sleep. Rather they reveal very alert coherent persons. Lack of sleep is not a factor here.

4) Petitioner contends she was ill while at the police station. (R. 185) Catherine Duerr never complained of illness to the police or demonstrated any sign of sickness. Ill ness simply was not a factor in this confession.

5) Finally petitioner indicates that the "leading"nature of the statement indicates that it is involuntary in nature. In fact the statement is not leading in nature, and is replete with fully explanatory answers. The questions are generally phrased so as to elicit explanations

rather than yes or no answers. In an effort to make this case fit in with lists of criteria found to be improper in other cases counsel simply asserts that such factors are present, when in fact they are not. From this false factual premise defense counsel then points to his long list of conjured up "violations" and argues in effect that where there is smoke there must be fire. In fact the only smoke present here is in appellant's brief, not in the record. There was no prolonged detention here. There was no denial of food or sleep. Petitioner was not ill, and never requested an attorney, and the statements are more narrative than leading in nature. The trier of fact obviously did not find any of the things defendants now complain of to be true, and his findings are supported by the record. Petitioner's claims here are without merit.

## CONCLUSION

This case is not one which needs further judicial review. The record reveals that the jury selection process was conducted in a manner designed to ensure the selection of an impartial jury. The media coverage, which was proffered and made part of the record, was strictly factual in nature, with none of the "yellow journalism" which has been found offensive in the past. This Court's decisions in Dobbert and Murphy set forth the law applicable to this situation, and the lower courts actions and rulings are in conformity therewith. The confession issue raised here by petitioner is totally without merit. Petitioner was three times advised of her rights and signed a written waiver. She was voluntarily present at a police station, accompanied by her mother and boyfriend. She was treated courteously and provided food. During the whole period she retained freedom of movement, and at one point left the police station alone. This situation shows no illegality or coercion of any type. The petition for merit should be denied.

Respectfully,

Arthur M. Ney, Jr.
Prosecuting Attorney

Leonard Kirschner
Assistant Prosecuting Attorney

William E. Breyer
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

Office - Supreme Court, U.S.
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NO 82 - 6699

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CATHERINE DUERR,

Petitioner

-vs-

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to the Court
of Appeals for the First Appellate District
Hamilton County, Ohio

# RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

H. FRED HOEPLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
(513) 241-1268

Attorney for Petitioner

OPPOSING COUNSEL:

Arthur Ney
Hamilton County Prosecutor
420 Courthouse
1000 Main Street
Cincinnati, Ohio 45202

## INTRODUCTION

To the Petition for a Writ of Certiorari, Respondent has filed a reply brief in opposition. As to the second ground raised in our Petition, we see no need for a response, and stand on the Petition as originally submitted. As to the first question, however, dealing with the denial of Petitioner's right to a fair and impartial jury, the reply of the Respondent requires the following brief response:

## REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A QUESTION OF FIRST IMPRESSION IN THAT THE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY EXCEEDS BOTH IN KIND AND DEGREE ANY SUCH VIOLATION HERETOFORE REPORTED IN THE ANNALS OF ANGLO-AMERICAN JURISPRUDENCE, PETITIONER HAVING BEEN FORCED TO TRIAL WITH A JURY WHICH WAS PRECONDITIONED TO FIND HER GUILTY BY THE KNOWLEDGE THAT BOTH OF PETITIONER'S CO-CONSPIRATOR-CO-DEFENDANTS HAD BEEN CONVICTED OF THE CONSPIRACY-MURDER IN WHICH PETITIONER WAS ACCUSED OF PARTICIPATING AS A CO-CONSPIRATOR.

Respondent parrots the reasoning of the Court below in urging denial of the Petition; it asserts that the decision as to whether a prospective jury in any given case is impartial, is solely a matter for the trial judge to determine in assessing the credibility of the jurors' promises that they will be fair and impartial, regardless of what they know of the case. Respondent cites Ohio Criminal Rule 24, to the effect that a prospective juror may be seated even where he has previously formed an opinion as to the guilt or innocence of the accused, so long as "the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." Id. [Emphasis added.]

To the extent that this rule needlessly permits the impanelling of biased jurors, it is unconstitutional. The

trial court should never have the sole discretion to determine, once and for all, whether a trial juror is fair and impartial, particularly where the only evidence in support of that conclusion is the promise by the juror that he will be impartial. As we stated in our Petition, there never has been seated in an American courtroom a juror who has not promised to be fair and impartial; as we stated in the Petition, such a promise is, or should be, only the beginning, and not the end, of the inquiry as to whether the constitutional right to a fair and impartial jury is being observed.

Respondent cites two cases from this Court in support of its argument that certiorari should be denied: Murphy v. Florida, 421 U.S. 794 (1975), and Dobbert v. Florida, 432 U.S. 282 (1977). Neither should be held to apply here.

In Murphy, the defendant attacked his jury because of the great amount of pretrial publicity, which Murphy felt prejudiced his case, as the publicity detailed his exploits as "Murph the Surf," and referred to his prior convictions. He alleged that the trial atmosphere had been utterly corrupted by press coverage. Interestingly, in that case, this Court reaffirmed the principle that mere denials of prejudice by jurors provides an insufficient basis, in and of itself, for concluding that they will be fair and impartial.

In Dobbert, the accused also contended that the trial atmosphere had been corrupted by the press coverage. As the Court stated, Dobbert's argument "that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He directs us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the

302.

Here, however, Petitioner rests on far more than Murphy's or Dobbert's assertions that the wealth of publicity, in and of itself denied them the right to a fair and impartial jury.

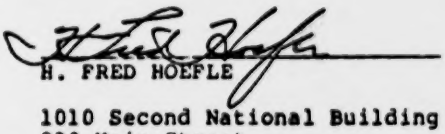
Petitioner, unlike Dobbert, did exercise all of her peremptory challenges; Petitioner, unlike Dobbert, does direct the Court to specific instances in the record, in the voir dire, where it is clear that she was denied the fair and impartial jury which is her constitutional right.

Petitioner states that the fact that all twelve of the jurors which were selected for her jury, after all peremptories had been exercised, and after the motion for change of venue was denied, were fully aware that her two co-conspirator-co-defendants had already been convicted of the conspiracy-murder with which she was charged, renders her jury unconstitutionally unfair in that the jury was preconditioned to find her guilty. The other two defendants had been found, on the same basic evidence, to have conspired with her to kill her father; if they were guilty of conspiring with her, then how could she be other than guilty of conspiring with them?

The Respondent's reliance upon Murphy and Dobbert is misplaced. For a decision of this Court more accurately reflecting the facts of this case, it would seem that Leonard v. United States, 378 U.S. 544 (1964) is more appropriate. There, the defendant was convicted of two similar crimes, and five of the jurors in the jury for the trial of the second offense were in the courtroom when the verdict of guilty on the first was announced shortly before the second trial began. Solicitor General Cox confessed error on behalf of the government, and this Court agreed, and reversed. The basis was not specifically stated, being so obvious, but the principle governing Leonard is that governing here: No person should be required to stand trial with a jury which is predisposed to find guilt because of its awareness of prior convictions, not in other, unrelated cases (as in Murphy), nor in similar cases, as in Leonard, but in the same case, involving the same offense, as that with which the accused is charged. The Constitution cannot countenance such a blatant violation of the precious right to trial by a fair and impartial jury embodied in the Sixth and Fourteenth

Amendments. The writ should be granted, the judgment below reversed, and the case remanded with instructions to grant Petitioner a new trial at which her right to trial by fair and impartial jury is scrupulously honored.

Respectfully submitted,



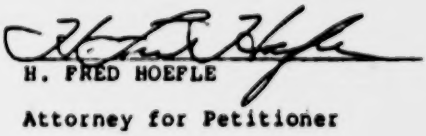
H. FRED HOEFLE

1010 Second National Building
830 Main Street
Cincinnati, Ohio 45202
Telephone (513) 241-1268

Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of June, 1983, I served a true copy of this Response on opposing counsel by leaving same at his office.



H. FRED HOEFLE

Attorney for Petitioner